SUPREME COURT, U. S.

JUL 19 1962

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No. 264

In the

Supreme Court of the United States

October Term, 1961

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE W. GOWINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE PENNSYLVANIA RAILROAD COMPANY,
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vs.

GEORGE W. GOWINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on March 6, 1962.

OPINIONS BELOW

The proceedings before the United States District Court for the Southern District of Ohio, Eastern Division, are unreported and appear in the transcript of the record. The opinion of the United States Court of Appeals for the Sixth Circuit dated March 6, 1962 is reported at 299 F. 2d 431 and appears herein in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered March 6, 1962. Petitioner filed a petition for rehearing which said Court denied by order entered April 30, 1962. The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, U.S.C.

QUESTION PRESENTED

This case involves the applicability of the Boiler Inspection Act, Section 22, et. seq., Title 45, U.S.C., to injuries claimed by respondent to have been received while in the employ of petitioner. The question presented is:

1. Where respondent testified that in the course of his duties he walked in oil on walkways of a locomotive and that after he debarked said locomotive to a ground surface of cinders and soil he lined up a switch and then went to a nearby telephone and from there walked a distance of 200 to 250 feet to an automobile parked near the tracks and that he conversed with the driver of the automobile 5 or 10 minutes and that he then went to the tracks and, while attempting to board a moving locomotive, slipped and tripped on a ground line air hose, did the Court of Appeals err in holding that respondent's claim for damages under the Boiler Inspection Act should have been submitted to the jury?

STATUTES AND REGULATIONS INVOLVED

The statute involved is Section 23, Title 45, U.S.C., which reads as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts

and appurtenances thereof have been inspected from time to time in accordance with the provisions of section 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The regulations involved are regulations of the Interstate Commerce Commission found in the Code of Federal Regulations, Title 49, Part 91, Sections 91.200, 91.203 (a), and 91.229 (a) and (d), as follows:

"§91.200 *Applicability of subpart.*

This subpart contains rules and instructions for the inspection and testing of locomotives propelled by other than steam power. . . .

"§91.203 *Trip or daily inspection.*

(a) Each locomotive unit when used in road service (including belt-line, transfer or work-train service) shall be inspected at least once every 24 hours, . . .

"§91.229 *Cabs and aprons.*

(a) Definition. The word "cab" as used in the rules and instructions in this subpart means that portion of the superstructure utilized for housing the enginemen and parts or appurtenances of the locomotive and through which a passageway is provided for the use of the engineman. . . .

"(d) *Floors.* Deck plates and floors of cabs, passageways, and compartments shall be kept free from oil, water, waste, or any obstruction that will create unnecessary peril. . . ."

STATEMENT OF THE CASE

The respondent, plaintiff below, commenced this action against petitioner in the United States District Court for the Southern District of Ohio, Eastern Division. The jurisdiction of that court was based on Section 1337, Title 28, U.S.C. and Section 56, Title 45, U.S.C. The respondent made allegations of negligence in his complaint seeking to invoke the Federal Employees Liability Act, Section 51, et seq., Title 45, U.S.C. and other allegations seeking to invoke the Boiler Inspection Act, Section 22 et seq., Title 45, U.S.C.

At the trial the evidence showed that respondent was employed by petitioner as the conductor of a train crew operating a train from Georgetown, Ohio, to Cadiz Junction, Ohio, and return on November 11, 1959. (R. 26a)

The train cars were hauled by four similar diesel locomotives. (R. 33a) Respondent testified that oil was present on the walkways of the locomotives. (R. 37a) He also testified that it was necessary for him to use the walkways in order to travel between the engine cab and the ground. (R. 37a)

Upon the return of the train to Georgetown, respondent debarked the locomotive at the east end of the Georgetown yard in order to line up a switch. (R. 38a) Respondent then proceeded to a telephone located nearby while the train entered the yard for the purpose of placing cars. (R. 38a; 39a and R. 58a) After using the telephone respondent walked 200 to 250 feet to a parked station wagon automobile occupied by its driver, another employee of petitioner. (R. 59a) The ground surface of the yard in the area over which respondent walked consisted of cinders and soil. (R. 13a and 22a) The evidence showed that there was oil present on that same ground surface. (R. 22a) Respondent

stood and talked to the driver of the station wagon for 5 to 10 minutes (R. 59a), and, upon the approach of his locomotive, respondent went to the track to climb aboard. (R. 39a) Respondent testified that as he attempted to board the moving locomotive, he "slipped and tripped," over a ground line air hose located beside the track. (R. 40a) As a result of the slipping and tripping, respondent sustained his alleged injuries.

At the conclusion of all the evidence, petitioner moved for a directed verdict on the grounds that (1) there was no evidence of negligence under the Federal Employers Liability Act, and (2) there was no evidence on which the claim for damages under the Boiler Inspection Act could be submitted to the jury. The District Court sustained petitioner's motion as regards the Boiler Inspection Act, (R. 96a) but submitted the issue under the Federal Employers Liability Act to the jury. The jury returned a verdict for the petitioner and judgment was entered January 26, 1961. Respondent's subsequent motion for new trial was denied by order entered March 2, 1961.

Respondent appealed the action of the District Court to the United States Court of Appeals for the Sixth District. One of the questions presented by respondent's appeal was the District Court's withdrawal of the issue under the Boiler Inspection Act from the Jury. The Court of Appeals reversed the judgment of the District Court and held that said Court was in error in withdrawing from the consideration of the jury, respondent's claim for damages under the Boiler Inspection Act. Judgment was entered March 6, 1962. Petitioner's subsequent petition for rehearing was denied by order entered April 30, 1962.

ARGUMENT

The petitioner maintains that the Court of Appeals was in error in holding that respondent's claim for damages under the Boiler Inspection Act should have been submitted to the jury, for the reason that it is readily shown that (1) there was no violation of the Boiler Inspection Act in this case, and (2) even if it be assumed there was such a violation, said violation was not a proximate cause of respondent's claimed injuries.

It is believed that a careful study of Section 23, Title 45 U.S.C., the pertinent regulations of the Interstate Commerce Commission, and the case authorities thereunder can only lead to the conclusion that the unexplained presence of a foreign substance on a locomotive is not within the intent and purpose of the Boiler Inspection Act. In the case of *Ford v. New York, N.H. & H. R. Co.*, (Cir. 2nd 1931) 54 F. 2d 342, cert. den. 285 U.S. 549, an employee was injured as he attempted to board the tender of a moving locomotive. The employee alleged that his hand slipped from a handhold because of the presence of grease on the handhold, and that he received injuries as a result thereof. The court affirmed the lower court's judgment of dismissal, stating in its opinion at page 343:

> "There is no explanation as to how grease came to be placed on the handhold; but there is testimony that the locomotive and tender were inspected that morning and that grease was placed in the grease cups underneath the tender, and the inference is indulged in that the workman who did this in some way placed grease upon the handhold.
>
> "We think the Safety Appliance and Boiler Inspection Acts have no application under these circumstances. * * * Having made the tender safe to operate, if later it became unsafe by putting grease on the handhold, even if such was negligently caused, it is not a violation of the statutory obligation of the ap-

> pellee * * *. If during the operation the safety appliance required by the act was rendered temporarily unsafe by reason of the grease placed thereon, this is not a condition which brings it within the purview of the act."

The Court in the *Ford* case also noted the legislative history of the Act, at page 344:

> "An examination of the debates in Congress on the passage of these acts, shows no intention by Congress to impose civil liability for a condition occurring during the operation of the train which does not affect the construction and maintenance as required by the Safety Appliance Act."

The petitioner maintains that the *Ford* case represents the law as it was intended to be. The basic statutory provision enacted for the protection of employees is the Federal Employees Liability Act, Section 51 et seq., Title 45, U.S.C., which bases employer liability on negligence. The Safety Appliance Act, Section 1 et seq., Title 45, U.S.C., which relates to equipment normally found on train cars, and the Boiler Inspection Act, which relates to equipment on locomotives and tenders, show a legislative intent that certain equipment, so important to the safety of employees, must be maintained free of defects. The absolute liability imposed by the latter acts have the effect of impressing upon carriers the need for the utmost care and inspection in the maintenance of equipment and appliances. It is readily seen that the same objectives are not present when the Safety Appliance Act and Boiler Inspection Act are sought to be invoked because of an unexplained foreign substance on equipment. The fact that a foreign substance was present, without more, can imply no responsibility to the carrier in the sense that the carrier might have remedied the situation, even with an ultimate degree of care. It seems clear that at least one of the purposes of the rules of the

Interstate Commerce Commission is to establish standards of responsibility for those matters over which a carrier has absolutely no control. And one of such standards is the rule requiring daily inspection of locomotives. Code of Federal Regulations, Title 49, Part 91, Section 91.203 (a). See also Section 91.200 which specifies that the rules apply to *inspection and testing* of locomotives. Therefore, it is clear that Section 91.229 (d), which provides that cab aprons shall be kept free of certain substances, describes a condition which is to be met only at the time of the daily inspection.

It is seen that Section 23 only requires that locomotives meet the tests set forth in regulations promulgated under such section. It is submitted that, if the regulations are complied with at the time of an inspection, the subsequent deposit of a foreign substance will not constitute a violation of the Boiler Inspection Act. In the instant case, there is no evidence that the oil on the walkways came from a defective piece of equipment. Indeed, there is no evidence as to how or when the oil came to be on the walkway. Moreover, there is no evidence to show that the locomotive was not inspected as prescribed by the regulations of the Interstate Commerce Commission, or, if it was inspected, that the oil was present at that time. The petitioner contends that under such circumstances there was no violation of the Boiler Inspection Act.

The case of *Lilly v. Grand Trunk Western Railway Co.*, 317 U.S. 481 (1943) has unfortunately been construed too broadly by certain authorities. The *Lilly* case should be confined to its specific facts and should not be held as authority in a case where there is no evidence to explain the presence of the foreign substance. In the case of *Calabritto v. New York, New Haven & Hartford R. Co.*, (Cir. 2d 1961) 287 F. 2d 394, the court applied the holding of the *Lilly* case

to a situation where an employee slipped on sand and oil located on the deck of the locomotive. It is significant that two of the judges concurred in the decision only with great reluctance. Circuit Judge Friendly, in his concurring opinion at page 397, stated:

> "The language of the Boiler Inspection Act * * * does not suggest to me a Congressional purpose to impose on railroads an absolute duty to keep the surfaces of locomotives and tenders as free from foreign matter at all times, as an operating room before surgery * * * Neither does anything in the legislative history of the Act afford the slightest basis for such a construction; indeed, it points rather in the opposite direction."

The petitioner respectfully calls this Court's attention to the authorities which hold that the Safety Appliance Act does not apply to a foreign substance present on the appliances enumerated in the Act. See *Collins v. Southern Pacific Co.*, (Cir. 9, 1961) 286 F. 2d 813. In the *Collins* case, the court distinguished Boiler Inspection Act cases by stating that the Safety Appliances Act uses the word "secure", while the Boiler Inspection Act uses the word "safe". Outside of attempting to limit the application of *Lilly v. Grand Trunk Western R. Co.*, *supra*, there is no reason to distinguish between the presence of oil on equipment located on a locomotive and the presence of oil on similar equipment located on a car.

It is respectfully submitted that nothing in the legislative history or in the language of the Boiler Inspection Act warrants the application of the Act to foreign substances whose presence is inexplained.

Assuming *arguendo*, that there was a violation of the Boiler Inspection Act, it is abundantly clear that such violation was not a proximate cause of respondent's alleged injuries. Respondent testified that he walked in oil on the

walkways of the locomotive (R. 37a). Respondent then debarked the locomotive, lined up a switch, and walked to a telephone located nearby (R. 38a, 39a and 58a). After using the telephone, he walked 200 to 250 feet to a station wagon where he stood and talked to the driver for 5 to 10 minutes (R. 59a). When the locomotive approached, respondent went to the tracks where he "slipped and tripped" as he attempted to board the locomotive. (R. 40a) It is important to note that the ground surface over which respondent walked consisted of cinders and soil (R. 13a and 22a). It is also important to note that there was oil present on the ground surface over which he walked (R. 22a).

On the above state of the evidence, it cannot be said that the oil on the walkway of the locomotive was a proximate cause of respondent's slipping and tripping on a ground line air hose in his attempt to board the locomotive. Such evidence is not sufficient to meet the test set forth in *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), stated at pages 483 and 484:

> "Events too remote to require reasonable prevision need not be anticipated * * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

The case of *Wright v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, 107 O. App. 310, 8 O.O. 2d 236 (1958), cert. den. 359 U.S. 979 (1959) illustrates that there is no proximate cause where, after a violation of the Act occurs, the chain of events is broken by movement to a different area and engagement in unrelated activities. In that case a train was halted by reason of defective coupler and brakes. The plaintiff, a fireman, was instructed to flag an oncoming train to get a spare knuckle for the coupler. After doing this, the plaintiff climbed into the engine cab where he sat for about eight minutes. The conductor then requested

the plaintiff to look in the nose compartment of the engine for a spare knuckle. While in the compartment, the plaintiff slipped on the floor as he threw out the knuckle. Plaintiff claimed his injuries were caused by the defective coupler and brakes. The court held that such events were too remote and were not links in an unbroken chain of reasonably foreseeable events, and said at page 313:

> "As we view the facts in this case, the injuries to plaintiff were occasioned by what had happened in the nose of the diesel engine. If the defendant is to be held liable in this case, it must result from the failure of some duty, if any, it owed to the plaintiff in his use of the compartment in the nose of the diesel. The breaking of the coupler had nothing to do with plaintiff's injuries."

Similarly, in the instant case, the petitioner could only be held liable as a result of a failure of some duty it owed respondent in the area in which he attempted to board the moving locomotive. And such issue was submitted to the jury.

In the instant case, there is no evidence that respondent acquired oil on his shoes. There is no evidence that any such oil remained on his shoes after extensive walking on a cinder and soil surface. There is no evidence that the respondent slipped and tripped because of oil on his shoes. After pure speculation, respondent would then have the jury guess that, if the respondent slipped because of oil on his shoes, such oil came from the walkway of the locomotive and not from the ground surface over which he walked.

It is emphasized that a violation of the Act must be a proximate cause. It need not be the sole proximate cause, but it must be a *proximate* cause. A cause which is too remote in time or in relation to the chain of events is not sufficient. The case of *Rogers v. Missouri Pacific R. Co.*, 352, U.S. 500, does not authorize pure speculation by the

jury. The test set forth in the *Rogers* case is whether the proofs justify *with reason* the conclusion that employer negligence played any part in producing the injury for which damages are sought, and the petitioner maintains that in the case at hand no such reasonable conclusion is justified from the evidence. Only one reasonable conclusion can be drawn in the instant case, and the proper action in regard thereto is stated in *Brady v. Southern Ry. Co., supra*, at pages 479 and 480:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Petitioner submits that the judgment of the Court of Appeals on the question presented should be reversed and that the judgment of the District Court should be affirmed. The foregoing argument indicates the reasons why a writ of certiorari should be allowed in this case. The judgment of the Court of Appeals is in conflict with the case of *Ford v. New York, N. H. & H. R. Co., supra*, as regards the applicability of the Boiler Inspection Act to foreign substances. It is believed that the purpose of the regulations of the Interstate Commerce Commission should be settled by this Court so that the authority of *Lilly v. Grand Trunk Western Railway Co., supra*, is not extended to those cases to which it was not intended to apply. Furthermore, the judgment of the Court of Appeals on the issue of causation under the Boiler Inspection Act is in conflict with the applicable decisions of this Court.

CONCLUSION

For the reasons stated petitioner respectfully prays a writ of certiorari be granted to review the decision of the Court of Appeals in this case.

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14632—George W. Gowins, Plaintiff-Appellant vs. The Pennsylvania Railroad Company, Defendant-Appellee.

[Decided March 6, 1962]

Before: Miller, Chief Judge, Simons, Senior Circuit Judge, and Darr, Senior District Judge.

Miller, Chief Judge. Appellant brought this action under the Federal Employers' Liability Act, Section 51, et seq., Title 45, U. S. Code, and the Boiler Inspection Act, Section 22, et seq., Title 45, U. S. Code, to recover damages for injuries suffered while working as a conductor of a crew operating a freight train of the appellee, The Pennsylvania Railroad Company. At the conclusion of the evidence, the District Judge granted the appellee's motion to withdraw the allegations under the Boiler Inspection Act from the consideration of the jury and the case was submitted to the jury on the issue of negligence under the Federal Employers' Liability Act. The jury returned a verdict for the appellee.

The job orders for the crew directed them to operate a freight train from Georgetown, Ohio to Cadiz Junction, Ohio, and then to take another train from Cadiz Junction to Georgetown, Ohio. The crew attached two locomotives and a caboose to the rear end of the train and also attached two other locomotives on the front end of the train and carried out the assignment.

When the train returned to Georgetown, appellant got off of one of the locomotives, lined up a switch and went to a telephone located at that point to report the train clear

of the switch. He then walked to a station wagon, about 200 to 250 feet away and talked to its driver. He waited there about ten minutes until the locomotives returned, after having taken the cars into the yard. As they approached, at a speed of from eight to ten miles per hour, appellant attempted to get on the engine to ride back to the telephone to report where he put the caboose. He testified that when he went to get on the engine, "I slipped and tripped over a ground air hose," that he was struck by the back grab handle of the front step, "swirled around . . . and knocked to the ground."

The air hose referred to was approximately an inch and a half hose and was used to put air into the cars. One end of the hose was attached to an iron air pipe and the other end would be attached to a car when in use and lying free when not in use. There was testimony that at the time in question the air hose was not in use and was lying on the ground outside of the ties in violation of Safety Rule No. 4533 of the appellee pertaining to maintenance of equipment. Appellant admitted on cross-examination that he saw the air hose on several occasions that day, that he considered the air hose in that position dangerous at that time, but that he did not do anything about it because it was not his job. Appellee also put in evidence Rule No. 1408, which read, "Getting on or off moving equipment, except when necessary for the proper performance of duties, is prohibited." Appellant claimed that his attempt to board the moving engine was necessary in the performance of his duty at the time.

The District Judge submitted to the jury the question of negligence on the part of the appellee and the question of contributory negligence on the part of the appellant. One of appellant's main contentions is that the District Judge

erred in not instructing the jury, as requested by appellant, that the doctrine of assumption of risk was not a defense to the action, Section 54, Title 45, U. S. Code, and that the charge of the District Judge in effect left the jury with the belief that assumption of risk was a defense to the action.

Assumption of risk as a defense, where there is negligence on the part of the employer, has been written out of the Act. But when used in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, it has not been written out of the law. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, concurring opinion of Mr. Justice Frankfurter at page 72, where it was said, "Because of its ambiguity, the phrase, 'assumption of risk,' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded." Assumption of risk was not pleaded as a defense by the appellee. Contributory negligence was pleaded by appellee, and under that issue an instruction permitting the jury to consider appellant's actions in the light of a dangerous condition known to him was proper. Section 53, Title 45, U. S. Code, *Chicago, St. P. M. & O. R. Co. v. Arnold*, 160 F. (2) 1002, C. A. 8th. If the instruction on contributory negligence was a correct one, we do not think it was error to refuse to instruct on the question of assumption of risk. *DePascale v. Pennsylvania R. Co.*, 180 F. (2) 825, 827, C. A. 3rd. We are of the opinion that the District Judge correctly instructed the jury on the issue of contributory negligence. *Atlantic Coast Line R. Co. v. Dixon*, 189 F. (2) 525, 527, C. A. 5th, cert. denied, 342 U. S. 830.

However, under the Boiler Inspection Act, negligence is not the basis of liability and the partial defense of contributory negligence and the bar of assumption of risk

are not available to the employer. The Act has been liberally construed in the light of its prime purpose, the protection of employees, by requiring the use of safe equipment. Any employee engaged in interstate commerce who is injurd by reason of a violation of the Act, has a cause of action under the Act. Section 23, Title 45, U. S. Code; *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481; *Urie v. Thompson, Trustee*, 337 U. S. 163, 188-189. The Act covers not only defects in construction or mechanical operation, but gives protection against the presence of dangerous objects or foreign matter. *Lilly v. Grand Trunk Western R. Co.*, supra; *Calabritto v. New York, N. H. & H. R. Co.*, 287 F. (2) 394, 397, C. A. 2nd.

In the present case, the train was powered by diesel engines. In order to go from the ground into the cab of the locomotive and conversely from the cab to the ground, it was necessary to walk along one of the walkways extending along each side of the two engines from the end of the locomotive to the cab. Appellant's duties required him to get onto and off the locomotives at the head end of the train.

Appellant testified that in the course of the trip he used the walkways on both locomotives all the time, that there was oil on the walkways, that the condition was worse on locomotive 8947, on which he rode on the return trip to Georgetown, and that in the course of his duty it was necessary for him to walk through the oil, "all the time." He also testified that when he attempted to get on the engine, he "slipped and tripped. . . ."

In *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506-507, the Supreme Court said, in a case brought under the Federal Employers' Liability Act, that the test of a jury case is simply whether the proofs justify with reason the

conclusion that employer negligence "played any part, *even the slightest*, in producing the injury or death for which damages are sought" (Emphasis added). If that test is met, a judge is "bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Gibson v. Thompson, Trustee*, 355 U. S. 18, 19; *Ringhiser v. Chesapeake & Ohio Ruy. Co.*, 241 F. (2) 416, C. A. 6th, reversed, 354 U. S. 901; *Moore v. Terminal Railroad Association*, 358 U. S. 31, and cases cited therein. In *Lavender v. Kurn*, 327 U. S. 645, 653, the Court said, "It is no answer to say that the jury's verdict involved speculation and conjecture" and "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." The Boiler Inspection Act is substantially, if not in form, an amendment to the Federal Employers' Liability Act and is subject to the same construction. *Urie v. Thompson, Trustee*, supra, 337 U. S. 163, 188-189.

We are of the opinion that under the rulings in *Lilly v. Grand Trunk Western R. Co.*, supra, 317 U. S. 481, and *Rogers v. Missouri Pacific R. Co.*, supra, 352 U. S. 500, the District Judge was in error in withdrawing from the consideration of the jury appellant's claim for damages under the Boiler Inspection Act. *Calabritto v. New York, N. H. & H. R. Co.*, supra, 287 F. (2) 394.

The judgment is reversed and the case remanded to the District Court for a new trial.

JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 6, 1962]

Appeal from the United States District Court for the Southern District of Ohio.

This Cause came on to be heard on the transcript of the record of the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for a new trial.

Approved for entry:

/s/ Shackelford Miller, Jr.
Chief Judge.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING

[Filed April 30, 1962]

Appellee's petition for rehearing having been considered by the Court;

It is ordered that said petition be denied.

Approved for entry:

/s/ Shackelford Miller, Jr.,
Chief Judge, U. S. Court of Appeals for the Sixth Circuit.